

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6184

To be argued by
EUGENE R. SCHEIMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM S. HERRMANN,

Plaintiff-Appellant,

—against—

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WIND-
DELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL
CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER,
M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY
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SEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP
K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN,
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ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN
M. BRANDT, DEBORAH H. SCHENK, PAUL SHERMAN, GARY
A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM
and S. HAL MERCER IV,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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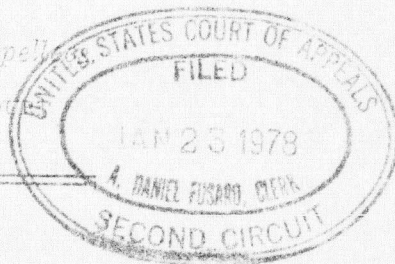




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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WILLIAM S. HERRMANN, :
 :
 Plaintiff-Appellant, : Docket No.
 : 77-6184
 -against- :
 :
 LEONARD P. MOORE, et al., :
 :
 Defendants-Appellees. :
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BRIEF OF DEFENDANTS-APPELLEES

This is an appeal by plaintiff William S. Herrmann from an Opinion, Order and Judgment entered in the United States District Court for the Eastern District of New York on October 19, 1977 by the Honorable George C. Pratt dismissing plaintiff's civil rights complaint, pursuant to defendants' motion under FED.R.CIV.P. 12(b), for lack of subject matter jurisdiction and failure to set forth a claim upon which relief may be granted. (2a-10a (Op.)).*

* The Appellant's Appendix, which contains the entire record before the court below, shall be cited as (___a). References to the Opinion below shall be cited by appendix pages, as (___a (Op.)).

This action against Brooklyn Law School and 38 other individuals connected with the Law School, along with an action brought simultaneously against the same 39 defendants in New York State Supreme Court, constitutes the latest round of litigation in a series of six groundless, harassing lawsuits brought by Mr. Herrmann against many of the same defendants. In his duplicative Supreme Court action, Herrmann seeks relief in the nature of contract damages for his allegedly wrongful dismissal from the faculty of the Law School and, remarkably, reinstatement as a tenured faculty member. Here, Herrmann seeks to elevate his termination to the status of a constitutional infringement.

Whether characterized as a breach of an employment contract or as a civil rights violation, however, the latest actions are, at bottom, only a recasting of Hermann's four-year-old dispute with the Law School, a dispute arising over his salary and escalated by his own improper behavior to the point where the Law School was forced to discharge him.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court below correctly decide that
(1) Brooklyn Law School does not function as an "arm of the state" (7a(Op.)), and that "the involvement of the state" in the "dismissal of plaintiff" (8a(Op.)) by Brooklyn Law

School, "a predominately private law school", "was negligible" (ibid.); (2) that none of defendants-appellees' activities were conducted "'under color of state law'" (8a (Op.)); and (3) that accordingly plaintiff-appellant's claims under the First, Fifth and Fourteenth amendments to the Constitution of the United States and under 42 U.S.C. § 1983 (1970) must be dismissed?

2. Did the Court below correctly decide that plaintiff-appellant stated no claim under 42 U.S.C. § 1985 (1970), in that (1) the claim of private deterrence of a previous tort action brought by plaintiff is not cognizable under 42 U.S.C. § 1985 upon the uncontested facts of the instant case; (2) there is no allegation of a "'class-based invidiously discriminative animus'" (9a (Op.)) against plaintiff, a white male, sufficient to state a claim under § 1985; and (3) that a claim of "conspiracy to interfere with freedom of expression" is not cognizable "absent state action or a class based discrimination" (10a (Op.)), and that plaintiff's proposed class of "champion[s] of minority groups" is a "'class contrived for litigation'" (9a-10a (Op.))?

COUNTERSTATEMENT OF THE CASE

The Events Leading up to Herrmann's Dismissal

In early 1973, following heated negotiations at Brooklyn Law School over salary increases, at which faculty members commented on each other's performance, and "a variety of personal exchanges occurred" (3a (Op.), 27a-28a), Herrmann sued a fellow faculty member in the New York City Civil Court for alleged defamation.* For some time, Herrmann had felt that he was underpaid by the Law School (see 28a, 48a), and the recent salary negotiations had resulted in a raise in salary for him which he apparently deemed insufficient. (28a). His Civil Court action, instituted on April 2, 1973, claimed that Professor Joseph Crea (also a defendant herein) had accused Herrmann of having "bought" public office, that this accusation was made "with the intention of injuring [Herrmann] materially as a Professor of Law" (52a-53a), and that Herrmann had in fact, "been injured materially" inter alia "as a Professor of Law . . . to his damages in the sum of \$10,000.00." (53a; see generally 3a (Op.)).

* The facts are set forth in their basic essentials in the Opinion of the Court below (3a-6a (Op.)) and in greater detail in the affidavit of Dean Raymond E. Lisle in support of defendants' motion to dismiss (24a-46a) and the exhibits thereto. (47a-216a).

On April 4, 1973, the faculty of the Law School addressed an appeal to the two parties stating:

"We, your colleagues, believe that the interests of Brooklyn Law School demand that the differences between you be resolved forthwith with dignity and without further formal proceedings. Each and all of us stand ready to mediate differences." (28a).

Other attempts at mediation were initiated, but rejected by Herrmann. (3a (Op.)).

Herrmann instead escalated his attack, and on April 23, 1974 (68a) served a subpoena ad testificandum upon a Law School student, Steven S. Elbaum (also a defendant herein), requiring him to testify at a deposition in Herrmann's Civil Court action. Elbaum, it should be noted, had previously complained in a letter to Dean Lisle in October of 1972 (58a) about Herrmann's outrageous classroom behavior. (29a). Elbaum subsequently appeared at a deposition in response to Herrmann's subpoena and testified.

Apparently not satisfied with venting his frustration and anger upon the Law School and his peers, Herrmann subsequently addressed a letter, dated December 2, 1974, to the Committee on Character and Fitness of Applicants for Admission to the Bar of the Appellate Division, Second Department, accusing Elbaum of perjury at his deposition.

(4a (Op.), 87a). Elbaum was eventually admitted to practice but "only after extended delay caused by plaintiff's letter." (4a (Op.)).*

Herrmann also deposed Dean Lisle and Professor Crea in connection with his Civil Court action in the fall of 1974, and, on January 28, 1975, filed another lawsuit, this time in federal court, charging the Dean and three other faculty members with defamation and conspiracy to deprive him of his "proper emolument as a professor of law" (see Herrmann v. Lisle, 75 C 130 (E.D.N.Y. Complaint filed Jan. 28, 1975). (4a (Op.), 29a-30a).

The Law School's Board of Trustees, understandably upset at this turn of events, and by the disruptive effect on the Law School of Herrmann's actions, appointed a Special Committee which petitioned the Faculty Hearing Committee on March 13, 1975 "to consider whether proceedings should be commenced regarding the propriety of plaintiff's actions." (4a (Op.), 31a). The Faculty Hearing Committee decided that the federal libel action, Herrmann v. Lisle, supra, in and

* In connection with Herrmann's perjury charge, it should be noted that prior to Elbaum's admission to the Bar, the Character Committee held hearings at which both Elbaum and Herrmann testified under oath. (33a).

of itself, did not constitute grounds for the institution of academic proceedings against Herrmann. (4a (Op.), 32a). At this time, the faculty was not aware of Herrmann's vindictiveness toward Elbaum before the Character Committee.

The faculty's tolerance was soon tested again, however, when it was brought to its attention that Herrmann's attorney in the federal libel action had referred to certain documents which could not have come into his possession except through a breach of the confidentiality of matters referred to the Faculty Hearing Committee. The faculty reacted by forming a committee to investigate this breach. Herrmann, once again evidencing a complete disdain for his peers, refused to cooperate in this investigation. (32a-33a).

Plaintiff's sullen refusal to assist this investigation and his shameful smear of Elbaum, recently brought to the faculty's attention, caused the Special Trustee Committee's petition of March 13th to be revived and expanded to cover these new incidents. The necessary procedural steps were taken to institute a hearing by the full faculty on the revived and expanded petition, as requested by the

full Board in a resolution adopted on May 19, 1975.
(33a-34a).*

The faculty met to consider the petition and to organize its hearing procedures. Charges against Herrmann were drafted and later served on him on July 14, 1975. These charges, in addition to the incidents already described, also included the following: (1) that Herrmann had engaged in certain improprieties in his class performance; (2) that he had threatened a student with a firearm; and (3) that he had prepared a false audit report of another faculty member's class performance, along with other matters. (See generally exhibit H to the Lisle affidavit (125a-134a) and 4a-5a (Op.)).

On July 18, 1975, Herrmann instituted another lawsuit, this time in New York State Supreme Court, Kings County, seeking to enjoin the Law School, Dean Lisle and others from

* In the opinion below, the Court states:

"On May 19, 1975, the board met, considered the faculty resolution, and resolved 'to have the entire faculty of the law school conduct a hearing on whether or not the federal litigation begun by plaintiff was instituted to intimidate and coerce other members of the faculty.'"

The underscored language is not wholly accurate. The board resolution called for the faculty to investigate five separate items, of which the federal court action was only one. (86a-88a).

taking any action with respect to his tenured status and, specifically, from proceeding with a hearing, and seeking \$1,000,000 in damages. His motion for a preliminary injunction was denied on July 30, 1977 (154a), and, after a stay was denied by the Appellate Division, Second Department, the faculty, on August 18, 1977 commenced a hearing on the matters alleged in the list of charges.

After four days of hearings, at which Herrmann and his counsel chose not to appear despite their receipt of timely notice*, and at which over forty witnesses testified (36a-37a), the faculty found that all but two of the allegations and part of a third were proven. (156a-160a).**

Among the charges found proven were V(A), as amended, stating that "Professor Herrmann improperly retaliated against Steven S. Elbaum for pursuing a complaint against Professor Herrmann"; charge V(F), as amended, to the

* Herrmann had previously served discovery demands with respect to these proceedings on the faculty and had also served a challenge to the composition of the hearing membership. His discovery demands were fully complied with, although a similar demand of Herrmann made by the attorney conducting the proceeding was completely ignored. (37a).

** Allegation V(H) (161a-164a) was dismissed. (159a). Allegations V(E) and V(G)(2), concerning, respectively, Herrmann's statements regarding the extent of his outside legal practice and his alleged shortening of classroom hours, were found not to be proven. (37a, 158a).

effect that he "falsely denied" the charges against him in Mr. Elbaum's letter of complaint to Dean Lisle; and charge V(G)(1), as amended, stating that Herrmann had "intimidated, ridiculed and humiliated students" and that during an altercation with a student, "he made it apparent to the student in a menacing manner that he was then armed with a pistol." (37a; compare 131a-134a with 157a-158a). The faculty also found that of the nine proven charges and another which was proven in three of its four subsections, each of six merited dismissal (159a), and accordingly recommended to the Board of Trustees that plaintiff be denied tenure and dismissed. (159a).

On September 17, 1975, the Board of Trustees approved the recommendation of the faculty and dismissed Herrmann on the grounds stated therein. (37a). Herrmann's reaction to his well-deserved dismissal was as predictable as it was futile -- another lawsuit, this time in federal court, demanding reinstatement and restoration of tenure, and claiming \$1,000,000 in compensatory and exemplary damages. This suit, styled as a petition "For a judgment pursuant to Article 78 CPLR," was, naturally, dismissed for lack of subject matter jurisdiction on June 30, 1976. (38a).*

* Herrmann's appeal to this Court from that dismissal was dismissed for failure to timely file his brief and joint appendix on October 7, 1976. (38a).

Finally, on December 16, 1976, Herrmann filed the instant action, against thirty-nine named defendants, alleging violations of his constitutional rights under the First, Fifth and Fourteenth Amendments, as well as under the Civil Rights Acts, 42 U.S.C. §§ 1983, 1985 (1970). (13a-21a). The Complaint, although far from a model of clear pleading, seems to allege that Herrmann was terminated due to the fact that he actively espoused policies of equal rights and equal employment opportunities for minorities, both for the Law School and in general, that his rights of freedom of speech and access to the courts were impaired, and that accordingly his dismissal was improper. He seeks \$2,000,000 in damages, reinstatement, and restoration of tenure.*

The Opinion Below

Defendants moved to dismiss Herrmann's complaint herein for lack of subject matter jurisdiction and for

* Herrmann's concurrent Supreme Court Action has been dismissed against all defendants except Brooklyn Law School, see Herrmann v. Moore, et al., Index No. 23498/76 (Sup.Ct. N.Y. Co. Order filed Nov. 23, 1977). It should be noted that the second count of that complaint, alleging a conspiracy among all the individual defendants to procure the breach of Herrmann's employment contract, was dismissed, the Court finding:

(footnote continued on next page)

failure to set forth a claim upon which relief may be granted. On October 19, 1977, the Hon. George C. Pratt granted defendants' motion and entered judgment dismissing the complaint.*

(footnote continued from previous page)

"The record before the Court demonstrates clearly that . . . [the] procedures [outlined in the Law School's Regulations] were fully complied with; that the faculty committee that recommended plaintiff's dismissal and the trustees who approved that recommendation were acting by virtue of their positions as directors and trustees and within the scope of their authority.

". . . There is not the slightest showing here that these defendants have committed any 'separate tortious acts' and indeed the complaint fails to enunciate a single 'act' committed by these defendants . . . the allegation that they 'intentionally procured' the breach of [Herrmann's] employment contract is merely the conclusion of the pleader and as such is insufficient. . . .

"In short, the cause of 'action alleged (is) insufficient because of plaintiff's failure to recite 'in non-conclusory language, facts establishing all the elements of a wrongful and intentional interference with (his) contractual rights (cites omitted).'" (Mem. op., filed Oct. 24, 1977, at 4-5.)

* Plaintiff-appellant Herrmann appears to be somewhat perplexed by this procedure. In his brief to this Court ("Pl.-App. Br."), at page 3, he makes reference to the fact that in defendants' motion to dismiss under FED.R. CIV.P. 12(b), "defendants did not deny their activities but used arguments to traverse the facts." He appears to be especially upset that none of the individual

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The Court first recognized that, in order to make out a claim under the First, Fifth and Fourteenth Amendments to the United States Constitution, as well as under § 1983 of the Civil Rights Act (42 U.S.C. § 1983), "some 'state action' must be shown." (7a (Op.)). Here, plaintiff-appellant sought to predicate "state action" on two basic theories: (1) that the Law School receives some limited state grants, and complies with the state education law, and (2) that the action of a state judge (and trustee of the Law School) in trying to mediate Herrmann's Civil Court action against Professor Crea, amounted to action under color of state law sufficient to charge all defendants-appellees.

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defendants took the trouble to contravert his wild assertions of a wide-ranging conspiracy against him and suggests, in desperation, that the lack of such factual disputes at this juncture "puts Judge Thompson and his actions . . . together with those of his co-conspirators in the proper light." (Pl.-App. Br., p. 23). It is elementary, of course, that no such inference may be drawn in the context of a motion under Rule 12(b).

Defendants, of course, do deny Herrmann's charges and again refer this Court to the affidavit of Raymond E. Lisle, former Dean of Brooklyn Law School, supporting defendants' motion to dismiss below (24a-46a), and the exhibits thereto, especially the charges against Herrmann (125a-134a) and findings of the faculty (156a-160a) for the essential facts of this controversy. For the moment, however, defendants confess that they are, indeed, relying on legal arguments. The merits of Herrmann's preposterous allegations aside, they certainly ought not to be litigated in a federal court.

The Court quickly disposed of the first prong of Herrmann's state action argument. It pointed out that even "substantial state involvement" is not sufficient; what is necessary is "a sufficient state nexus" with the "particular activity challenged." (7a (Op.)). This Court, in Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973), had already held that the Law School's contacts with the state were insufficient to "render the school an agent of the state." (7a-8a (Op.)). Herrmann demonstrated nothing to show any closer connection in this case. "And," the Court concluded, "even if the [state] involvement were enough to render some of the law school's activities state action, dismissal of plaintiff would not be one such activity." (8a (Op.)) (emphasis in original). New York, in short, is no more involved in the dismissal of incompetent professors by private law schools than it is in their dismissal of failing students, the academic decision challenged in Grafton.

As to the second alleged basis for a finding of state action, the Court first observed that whatever involvement there might have been in Herrmann's Civil Court action on the part of the Deputy Administrative Judge of the City of New York, such involvement evidently had no effect, as Herrmann continued to pursue his action "with even greater determination." (8a (Op.)). No damages to Herrmann thus

resulted from what Herrmann so inelegantly characterized as Justice Thompson's "leaning on" (305a-306a) the trial judge in Herrmann's Civil Court case. (8a (Op.)). The only injury alleged in Herrmann's complaint was his wrongful dismissal by the Law School, and any role Justice Thompson played in that determination was purely in his private capacity as a trustee of the Law School. Such private action was "thus not cognizable under § 1983." (9a (Op.)).

Turning to Herrmann's § 1985 allegations, the Court first dealt with Herrmann's claim under subsection 2 of that statute, which provides, under certain circumstances, a cause of action to anyone who has been injured on account of his having been a witness or party in a federal court. Here, Herrmann argued that he had been dismissed on account of having brought his federal libel action. Even under Herrmann's expansive reading of § 1985(2), however (see discussion at pages 51-64, infra), the Court found that the essential facts he presented did not establish the conclusory claim of a cause and effect relationship between his libel action and his dismissal.* Tracking the language

* Herrmann's reading of the opinion below on this point is somewhat puzzling. He states that the Court "found a conspiracy to intimidate, retaliate against and injure plaintiff for being a party and a witness but said it was not actionable. . . ." (Pl.-App. Br., p. 3). In fact, the Court held that Herrmann presented no allegations supporting his conclusion that he had been injured on account of having been a party or witness in federal court. Defendants will demonstrate, at pages 31-39, infra, the correctness of this holding.

of a case cited by Herrmann, Brawer v. Horowitz, 535 F.2d 830, 840 (3d Cir. 1976), the Court held that nothing in his allegations "'connect[ed] . . . the proscribed activities [injuring a party on account of his attending and testifying in a court of the United States] to a federal court.'" (9a (Op.)).

As for subsection 3 of § 1985, providing a cause of action for anyone injured as a result of a conspiracy motivated by a "class-based, invidiously discriminatory animus," see Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), the Court took a dim view of Herrmann's attempt to "show membership" in, and the necessary "'invidious class-based discrimination'" against, the purported class of "champion[s] of minority groups." (9a(Op.)). The Court held that such a class was one "'contrived for litigation' rather than a readily cognizable and traditionally protected class." (10a(Op.)). "At best," the Court concluded, Herrmann's allegations presented a possible claim of an interference with his "freedom of expression[*] . . . and, . . . absent state

* Herrmann's apparent lack of understanding of the office of a motion to dismiss (see footnote on pages 12-13, supra), is again reflected in his comment that the Court below "ignored the defendants' argument that there was no conspiracy and found one . . . but said it was a conspiracy to deny free speech and not actionable." (Pl.-App. Br., p. 3). Obviously, the Court found no such thing.

action or a class-based discrimination, such a claim is not cognizable" under 42 U.S.C. § 1985. (Ibid.) Herrmann's complaint was therefore dismissed.

As we will show, no other decision was possible given the uncontested facts presented to the Court. Herrmann cannot possibly show, four years after Grafton v. Brooklyn Law School, supra, the requisite involvement of the state in his dismissal. His attempt to avoid the burden of showing state action by contriving a new class of oppressed persons, namely those not suffering from discrimination who advocate the cause of a minority group, is equally frivolous.

ARGUMENT

POINT I

THE COURT BELOW CORRECTLY DISMISSED
HERRMANN'S CLAIMS UNDER THE CONSTI-
TUTION AND 42 U.S.C. § 1983

A. The Absence of State Action
in Brooklyn Law School's De-
cision to Dismiss Herrmann

As the Court below stated, plaintiff-appellant Herrmann's claims under the First, Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 require a showing of "state action" or action "under color of law" to make out a cognizable claim in a federal court. There must be a significant involvement of the state in the wrongs alleged to state a claim. See Civil Rights Cases, 109 U.S. 3, 11 (1883).

Significantly, Herrmann has abandoned any claim of state involvement in his dismissal other than through the participation of Justice Thompson. (See Pl.-App. Br., pp. 18-24.) His lack of faith in his own state action allegations, if indeed there ever were any aside from a reference to state judicial officials, is well-founded. In light of Grafton v. Brooklyn Law School, supra, in which this Court found that the negligible regulation of private law schools

by New York did not involve the state sufficiently in Brooklyn Law School's dismissal of failing students to render such dismissal state action, it is inconceivable that the requisite state action could be shown in the same school's dismissal of an incompetent professor, a matter of even less moment to New York's Department of Education and its Court of Appeals than the matriculation of students. (See 39a-46a.)*

Moreover, since Grafton was decided, it has become even clearer that the state involvement alleged must be related to the wrong complained of to state a claim. In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), the Supreme Court held:

* Grafton involved an action brought against the Law School by two former students who had been dismissed for academic reasons. Relying on Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), this Court rejected the contention that the furnishing of higher education constituted state action, as a "public function" (as used in Marsh v. Alabama, 326 U.S. 501 (1946)); rejected the argument that state action could be predicated on the minimal requirements for qualitative academic standards imposed under the New York Education Law and by the New York State Court of Appeals; and found that the amount and types of financial aid rendered to the Law School by the State were not sufficient to "convert it from a private into a public institution" 478 F.2d at 1141. In the instant case, a fortiori, since not even minimal standards for hiring and firing of faculty exist under the Education Law or the Rules of the Court of Appeals with respect to private institutions, the same conclusion follows.

"[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

This nexus between the State and the particular injury alleged by plaintiff must be demonstrated even where substantial state involvement is shown (7a (Ct.Op.)), citing Taylor v. Consolidated Edison Co., 552 F.2d 39 (2d Cir. 1977).^{*} As is clear from the record below, there is no conceivable nexus between the state and the dismissal of Herrmann. It must follow, therefore, that the Court below properly ruled that the Law School does not function as an arm of the state, and that Herrmann has failed to demonstrate any state nexus with his dismissal whatsoever.

B. Action of a State Judicial Officer Insufficient

In an attempt to revive his § 1983 claims, Herrmann has now mounted a broadside attack on the public and private activities of Justice Thompson relating to Herrmann and the state involvement allegedly flowing from such activities. Not surprisingly, in Herrmann's new formulation of his state action argument, Justice Thompson has assumed

^{*} Accord, Cannon v. University of Chicago, 559 F.2d 1063, 1068-71 (7th Cir. 1976); Berrios v. Inter American University, 535 F.2d 1330, 1332-33 (1st Cir. 1976); Cohen v. Illinois Institute of Technology, 524 F.2d 818, 826 & n.23, 827 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); Stewart v. New York University, 430 F.Supp. 1305, 1309-13 (S.D.N.Y. 1976); Furumoto v. Lyman, 362 F.Supp. 1267, 1276-80 (N.D.Cal. 1973).

awesome powers, providing the "cohesive force holding the appellees together and leading them in their conspiracy." (Pl.-App. Br., p. 23). Even under this fantastic scenario, however, which was barely hinted at in Herrmann's complaint (see 17a), Justice Thompson cannot provide the actionable state involvement which Herrmann so desperately seeks.

As has already been noted, the Court below found that Justice Thompson's official actions could not have resulted in any cognizable injury to Herrmann, and any actions he may have taken with regard to Herrmann's status at the Law School were performed in his private capacity as trustee. The record amply reflects the correctness of the Court's findings. A review of the papers submitted by Herrmann below reveals that the only actions alleged to have been performed by Justice Thompson having any connection with his capacity as Deputy Administrative Judge of the City of New York consisted of his efforts to settle Herrmann's defamation action against Professor Crea.* (302a-306a). As

* Herrmann's attempt in his brief to this Court to expand Justice Thompson's official capacity to cover activities which are in fact private cannot overcome the Court's finding. Herrmann finds "official capacity as Administrative Judge of the Civil Court of the City of New York" (Pl.-App. Br., p. 22) in Justice Thompson's appearance before the faculty hearing in August of 1975, citing 555a. Aside from the fact that this citation

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the Court below found, and as is uncontroverted in the record, Herrmann suffered no harm whatsoever from Justice Thompson's actions. He continued to press his suit, won a dismissal of Professor Crea's counterclaim, and, on the eve of trial, settled the case.* Failure to allege any harm resulting from the actions complained of warrants summary dismissal of a complaint. Frankos v. LaVallee, 535 F.2d 1346 (2d Cir. 1976) (no damage alleged from activity); Powell v. Workmen's Compensation Board, 327 F.2d 131 (2d Cir. 1964) (complaint properly dismissed for failure to show deprivation of rights).**

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does not support such an inference, "[a] witness in a trial is not acting under color of law. . . . The fact that the witnesses may have been State officials is not significant. . . ." Smith v. Sinclair, 424 F.Supp. 1108, 1113 (W.D.Okla. 1976). It is even clearer that a witness at a private law school hearing does not act under color of law.

* Plaintiff-appellant misperceives the nature of defendants-appellees' position on the role of Justice Thompson when he states that "[t]hey [defendants] go so far as to admit Judge Thompson's role but claim it is not as bad as what the judge did" in Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963). (Pl.-App. Br., p. 3). That is not defendants-appellees' position. To use Herrmann's nomenclature, Justice Thompson did nothing "bad" at all. In his capacity as Deputy Administrative Judge, he devoted many hours to the mediation of Herrmann's Civil Court suit. That his selfless efforts should be met with a federal lawsuit is a dramatic illustration of the reason for the policy of judicial immunity, discussed at pages 23-27, infra.

** Cf. Bradford Audio Corp. v. Pious, 392 F.2d 67, 71-72 (2d Cir. 1968) (although judge with pecuniary interest in case illegally appointed receiver for plaintiff corporation, no violation of § 1983 where another judge made final decision after full hearing making receivership permanent).

All other activities claimed to have been undertaken by Justice Thompson clearly relate to his private role as a Trustee of the Law School. As the Court below correctly held, these actions, though undertaken by a state official, "are purely private and thus not cognizable under § 1983." (9a (Ct. Op.)). See Lynn v. McElroy, 176 F.Supp. 661 (N.D.Ala. 1959), aff'd, 284 F.2d 299 (5th Cir. 1960), appeal dismissed, 368 U.S. 5 (1961) (discussed in detail at 247a-248a). In Sinchak v. Parente, 262 F.Supp. 79, 88 (W.D.Pa. 1966), a civil rights complaint alleging misuse of judicial process by a mayor in his re-election campaign was dismissed where the complaint did not allege facts showing "how and under what circumstances as a mayor" the defendant misused the judicial system (emphasis added). Here, Herrmann has failed to show "how and under what circumstances," as a judge, Justice Thompson brought about his dismissal. It should also be noted that conclusory allegations of action within official capacity, without further detail, are insufficient to withstand a motion to dismiss. LaRouche v. City of New York, 369 F.Supp. 565 (S.D.N.Y. 1974).

In any event, Justice Thompson is immune from liability for any action taken in his judicial capacity and in the course of his judicial functions.* Pierson v. Ray, 386

* Although the Court below did not find it necessary to reach this question, which was briefed to it, defendants-

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U.S. 547 (1967); Kurz v. State of Michigan, 548 F.2d 172, 174 (6th Cir. 1977); Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir. 1968); Fanale v. Sheehy, 385 F.2d 866 (2d Cir. 1967) (involving §§ 1983 and 1985). Such immunity extends even to acts committed "in excess of [a judge's] jurisdiction and with malice", Duba v. McIntyre, 501 F.2d 590, 592 (8th Cir. 1974), cert. denied, 424 U.S. 975 (1976). Since Justice Thompson was authorized to "administer and regulate the operations" of the New York City Civil Court, see N.Y. Judiciary Law § 217 (McKinney Supp. 1977-78), and since, as Herrmann points out (Pl.-App. Br., pp. 21-22), Justice Thompson was acting "in his official capacity," in connection with Herrmann's Civil Court case, Justice Thompson's immunity from liability follows accordingly.*

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appellees wish to raise it again at this juncture. This Court, of course, may affirm the judgment below on any valid ground upon which the Court below could have rested its decision. See Kauffman v. Moss, 420 F.2d 1270, 1272 (3d Cir. 1970) (Court of Appeals affirmed dismissal of civil rights action on basis of immunity; issue not reached by district court); Noel v. Linea Aeropostal Venezolana, 318 F.2d 710, 711 (2d Cir. 1963). Even if Herrmann could have alleged some injury stemming from Justice Thompson's actions in Herrmann's Civil Court case, therefore, the judgment below must still be upheld.

* Since it is uncontested that Justice Thompson was acting within his official capacity while mediating Herrmann's Civil Court dispute, Herrmann's citation of Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963), stating that judicial immunity extends only to actions within a judge's jurisdiction, is beside the point.

Moreover, a judge does not lose such immunity under §§ 1983 and 1985 simply because he exercises his judicial powers informally. See Smith v. Martin, 542 F.2d 688 (6th Cir. 1976) (judge holding settlement conference in a party's office). To the extent that Justice Thompson is alleged to have mediated Herrmann's Civil Court action in a setting other than a courtroom, his immunity remains unaffected.

Assuming the alleged participation of a state judge to be the only basis for state action in Herrmann's complaint, the immunization of that judge would, in turn, remove the taint of state action from all of the acts alleged therein. Private persons, not otherwise acting under color of law, cannot be held liable under the Civil Rights statutes merely because of the alleged participation of state officials, or persons serving in a public capacity, in the wrongdoing claimed where the officials are themselves immune from liability for the acts alleged. Kurz v. State of Michigan, *supra*, 548 F.2d at 175; Hansen v. Ahlgrimm, 520 F.2d 768, 770-71 (7th Cir. 1975); Sykes v. California, 497 F.2d 197, 202 (9th Cir. 1974); McIntosh v. Garofalo, 367 F.Supp. 501, 504-05 (W.D.Pa. 1973); Stambler v. Dillon, 302

F.Supp. 1250, 1255 (S.D.N.Y. 1969). Cf. Reilly v. Doyle, 483 F.2d 123, 128-29 (2d Cir. 1973).

From the foregoing, it should be clear that no actionable conduct on the part of Justice Thompson has been set forth in Herrmann's complaint, even as amplified by his affidavit. No harm has been alleged which relates to any activity on the part of Justice Thompson in his judicial capacity. Moreover, he, along with all of the other defendants, would be immune from any liability for such harm if there had been any. In Justice Thompson's trustee capacity, of course, only private action is involved.*

* Herrmann cited a number of cases below to the effect that judges are not immune from suits for injunctive relief. See Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973); Javits v. Stevens, 382 F.Supp. 131 (S.D.N.Y. 1974); Wallace v. McDonald, 369 F.Supp. 180 (E.D.N.Y. 1973). In all of these cases, however, the injunctive relief being sought related to actions taken in the defendants' official capacities. As this Court noted in Erdmann v. Stevens, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972):

"no sound reason exists for holding that federal courts should not have the power to issue injunctive relief against the commission of acts in violation of a plaintiff's civil rights by state judges acting in their official capacity." 458 F.2d at 1208 (emphasis added).

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As in Weaver v. Haworth, 410 F.Supp. 1032, 1035-36 (E.D.Okla 1975), all of plaintiff's claims about Justice Thompson relate either to "[Justice Thompson's] authority as a judge", in which case "he is immune", or to conduct "outside the scope of [his] judicial duties or authority", in which case he "would not be acting under color of state law", removing "the first essential element to establish a claim under 42 U.S.C. § 1983." In either case, as judge or trustee, Justice Thompson's presence does not provide the requisite state action. Herrmann's claims under Amendments I, V and XIV and under 42 U.S.C. § 1983 were therefore properly dismissed by the Court below.

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Here, Herrmann has not sought injunctive relief with respect to his Civil Court action, which is now terminated. The only injunctive relief he seeks is reinstatement by Brooklyn Law School, a subject which, the Court below found, is totally unrelated to Justice Thompson's official capacity. (9a) (See also pages 15, 23, supra.) Defendants-appellees have not argued that Justice Thompson is immune from liability for acts performed as a trustee of the Law School, but rather that such acts do not provide the state action necessary to establish liability in the first place. Herrmann's cases on this point therefore are of no use.

POINT II

THE COURT BELOW CORRECTLY
DISMISSED HERRMANN'S CLAIMS
UNDER 42 U.S.C. § 1985

A. Introduction

Section 1985 of Title 42 of the United States Code provides, in relevant part:

"Obstructing justice; intimi-
dating party, witness or juror

"(2) If two or more persons . . . conspire to deter . . . any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein . . . or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"Depriving persons of
rights or privileges

"(3) If two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . or if two or more persons conspire to prevent . . . any citizen who is lawfully entitled to vote, from giving his support

or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person . . . ; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do . . . any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(2), (3) (1970).

What is now 42 U.S.C. § 1985 was enacted in its original form as Section 2 of the Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13, a criminal statute passed in response to the violence and terrorism directed against blacks and Republicans of both races in the South during Reconstruction. See message of President Grant to Congress, reprinted in CONG. GLOBE, 42nd Cong., 1st Sess. 244 (1871); remarks of Rep. Shellabarger, id. at 317. Representative Ellis Roberts, in describing the factors that gave rise to this legislation, pointed out that "the victims [of Klan violence] . . . are always Republicans. They may be black or white . . . but only Republicans." Id. at 412-13. As Representative Morton of Indiana observed, "large classes of people, numbering nearly one-half in some of the States, are without legal remedy." Id. at Appendix, 252. See also, RADICAL REPUBLICANS AND RECONSTRUCTION 503-19 (H. Hyman ed. 1967).

The intent of Congress in passing the Klan Act was, accordingly, to create federal protection for persons injured because of their membership in certain recognized groups. The framers took great pains to explain that they were not creating a federal law of crimes. See remarks of Rep. Moore, CONG. GLOBE, supra, at Appendix, 112; remarks of Rep. Shellabarger, id. at 382. Congress was not interested in providing redress for a "neighborhood feud" (remarks of Sen. Edmunds, id. at 567), but rather in "the prevention of deprivations" of equal rights. Id. at 478 (remarks of Rep. Shellabarger).

This history and intent is central to an understanding of the scope of § 1985. See Griffin v. Breckenridge, 403 U.S. 88, 96, 99-102 (1971). Nothing could have been further from the legislators' minds than providing disgruntled employees not suffering from any recognized form of discrimination with a vehicle for harassment of their employers in the federal courts. Accordingly, as will be explained at pages 40-64, infra, not even Herrmann's most extravagant claims are sufficient to state a claim under § 1985, as he simply cannot show the type of class-based discrimination, other than the natural aversion to incompetence shared by most employers, which this statute was meant to rectify.

Before delving into the proper construction of § 1985, however, defendants-appellees wish to give some attention to the Court's treatment of Herrmann's claim under subsection 2 thereof. Essentially, the Court found it unnecessary to reach the legal issues raised by that claim,* finding, instead, that the uncontested facts before it did not state any injury "on account of" Herrmann's having brought or testified in a federal court action. (9a (Op)).

B. Herrmann's Allegations of Fact Show
No Injury to Him Resulting From His
Having Brought a Federal Action

It will be recalled that 42 U.S.C. § 1985(2) provides, in part, a cause of action to anyone injured "on account of his having" "attended or testified" as a "party or witness in any court of the United States". Whatever else is required to make out a claim under this provision, and defendants-appellees will show at pages 51-64, infra, that a good deal more is needed, no party here disputes that, at

* Once again, Herrmann misreads the Court's opinion below when he blandly asserts that "[t]he Court below . . . referred to and agreed with the law as set forth [in Herrmann's brief] in regard to 42 U.S.C. § 1985(2)." (Pl.-App.Br., p. 6). What the opinion does say, in effect, is that even if the law as stated by Herrmann were correct, citing Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976), Herrmann has still not alleged an injury resulting from his having been a party or a witness in federal court.

Herrmann relies on Brawer for the proposition that no class based discrimination need be alleged to state a claim under the first clause of § 1985(2), a subject which is discussed at pages 51-64, infra.

the very least, an injury "on account of" Herrmann's prior federal action (Herrmann v. Lisle, supra) must be proven.

The Court below correctly found, however, that "the original cause of action here was initiated in state court. See Herrmann v. Crea . . ." (9a (Op.)). In other words, as a factual matter, to the extent that Herrmann has suffered injury on account of having brought a lawsuit, such injury has been the result of his Civil Court action, not his federal libel action. Even accepting all of Herrmann's non-conclusory allegations, no claim under the first clause of § 1985(2) (the first twelve and part of the thirteenth lines of paragraph "(2)", quoted on page 28, supra), the clause upon which Herrmann bases his claim (see Pl.-App.Br., p. 5), has been stated.*

Herrmann, of course, would prefer a different conclusion from the uncontested facts and offers the explanation (at Pl.-App.Br., pp. 6-8) that Judge Pratt must have forgotten about the federal libel action. Judge Pratt, of course, did no such thing. The Court clearly recognized the existence of the federal action and made reference to it on two occasions (4a, 5a (Op.)), including the following comment which seems to have been overlooked by Herrmann:

* Herrmann appears to have abandoned his implicit claim under the second clause of § 1985(2) (see 17a), which provides an analogous cause of action in the case of conspiracies to impede or obstruct "the due course of justice" in state courts. Should he now attempt to revive it, defendants-appellees' response thereto is found in the footnote on page 52, infra.

"The board decided, however, that bringing the federal suit was an insufficient ground to warrant institution of proceedings against the plaintiff." (4a (Op.)) (referring to the first Faculty Hearing Committee determination, see, pp. 6-7, 8-9, supra).

Obviously, the Court below was perfectly aware of the federal libel action and its role in the chronology of Herrmann's dismissal.

The Court's implicit rejection of the federal libel action as the reason for Herrmann's dismissal is well grounded. First, it is quite clear that Herrmann discovered the significant connection which he now sees between his federal libel action and his dismissal some time after the drafting of his complaint. His complaint describes three of his previous lawsuits against Brooklyn Law School and persons connected therewith (discussed at pages 4-6, supra) in paragraphs 11-13 (15a), with the federal libel action sandwiched in between two state court actions.

Paragraph 16, the first of two paragraphs dealing with injuries suffered on account of having brought such lawsuits, states, in full:

"That from April 1975 the defendants conspired together to deter the plaintiff from attending in court and from testifying therein freely, fully and truthfully and to injure him on account of his having so attended or testified and conspired together for the purpose of impeding, hindering, obstructing and defeating the due course of justice with the intent to deny plaintiff the equal protection of the laws and commenced a series of actions and took steps to

harass the plaintiff to interfere with his Constitutional privileges and rights of free speech, access to courts and court processes, his work on behalf of advancing the opportunities and equality of minority people and to deprive him of his employment and to a livelihood for himself and the equal enjoyment of rights secured by the law to all citizens." (16a).

Nowhere in this typically blunderbuss allegation does Herrmann single out the federal action as the source of defendants-appellees' alleged wrath against him.

Moreover, the only other paragraph in the complaint which sheds any light on this topic is the 17th, which, apparently referring back to the 16th, states, in full:

"That among the actions taken by the defendants, the said defendants conspired together with the defendant, EDWARD THOMPSON, who was the Administrative Judge of the Civil Court of the City of New York, to impede, hinder, obstruct, deter and defeat the due course of justice with intent to deny to the plaintiff the equal protection of the laws and to injure him and his property rights and Constitutional rights, while he was lawfully attempting to and enforcing his rights to the equal protection of the law." (17a).

Herrmann's complaint, then, tracking the language of the second clause of § 1985(2), emphasizes only the alleged deterring of his Civil Court action by defendants-appellees and injuries done to him on account of having brought that action. His federal libel action is almost lost in the shuffle. It is obviously Herrmann, and not the Court below, who ignored that action. The short answer, and the best one, to his afterthoughts on this point is thus the one the Court below gave, namely that the apparent origin of

his injury, if any, was his Civil Court action. The dismissal of his § 1985(2) claim ought therefore to be sustained on the grounds cited by the District Court.

Since Herrmann's complaint offers no support for his § 1985(2) theory, he has turned, in desperation, to the material submitted by defendants-appellees to sustain his position.* He argues, as he did below, that the Special Trustee Committee's petition against him and the charges drawn up pursuant to the revised version of that petition (discussed at pages 7-10, supra), all of which mention the federal libel action, provide the necessary link between that action and his dismissal. The Court below evidently was not impressed with this informal amendment to Herrmann's § 1985(2) claim and did not expressly deal with it. Although the opinion below is easily supportable on its own terms, defendants-appellees will show that Herrmann's post-complaint theory offers no better support for his § 1985(2) claim than did his complaint.

Contrary to Herrmann's selective quotations therefrom (at Pl.-App.Br., pp. 7-14), the facts submitted by

* Interestingly, Herrmann never cites to his complaint, as a plaintiff might be expected to do in attempting to defeat a Rule 12(b) motion, in explaining the Court's error on this point. He instead states that the Court "overlooked the patent documentary proof" submitted by defendants-appellees. (Pl.-App.Br., p. 6).

defendants-appellees to the Court below regarding Herrmann's dismissal, which were summarized in the opinion (3a-5a (Op.)), and which have been detailed herein at pages 4-10, supra, do not support his argument. As has been explained, the initial Special Trustee Committee petition of March 13, 1975 (79a-84a), which dealt only with the federal libel action, was rejected by the Faculty Hearing Committee. The Hearing Committee determined that the bringing of such action did not constitute sufficient grounds to commence disciplinary proceedings against Herrmann. (32a). Although Herrmann takes great pains to identify and describe the March 13th petition (Pl.-App.Br., pp. 7-8), the rejection of that petition, a fact not denied by Herrmann, is somehow omitted from his scenario.

It was only after the faculty learned of Herrmann's shameful vindictiveness toward Elbaum (see discussion at pp. 7-8, supra) that the petition was revived. As Herrmann correctly notes (Pl.-App.Br., pp. 9-10), the resolution of May 19th covered the five following items regarding Herrmann's conduct: 1) whether his federal libel action was brought in good faith; 2) the circumstances under which a confidential memorandum from the Special Trustee Committee to the Faculty Hearing Committee was made available to

Herrmann; 3) whether Herrmann refused to cooperate with the faculty committee investigating said breach of confidentiality; 4) whether Herrmann's letter to the Character Committee concerning Elbaum was written in good faith or was written for the purpose of "disrupting the proper procedures of the Law School by intimidating students"; and 5) any other conduct reflecting on his fitness. (86a-88a). The good faith of the federal libel action was thus only one of five problems to be considered.*

The charges against Herrmann prepared pursuant to the May 19th resolution reflect an even wider area of concern. Charges I-IV expand on the first four items in the faculty resolution. (125a-131a). Item V covers eight separate offenses, including the charges: (A) that Herrmann intimidated Elbaum; (B) that the Civil Court action was brought to "silence Professor Crea's and others' criticism of Professor Herrmann's behavior . . .; to coerce a salary increase from Brooklyn Law School" (132a); (C) that Herrmann threatened Professor Yonge, also a defendant herein; (F)

* As noted before, in the footnote on page 8, supra, the Court's description of the May 19th petition, referring only to the federal libel action (5a (Op.)), is incomplete. For some reason, Herrmann attempts to rest his § 1985(2) theory on the Court's incomplete description of that petition (see Pl.-App.Br., p. 8), while correctly observing that it covered five items (id. at pp. 9-10).

that while under oath at a Character Committee hearing on Elbaum's application for admission, Herrmann falsely denied the charges in Elbaum's letter of complaint to Dean Lisle; and (G) that Herrmann failed to discharge his teaching obligations by engaging in various types of improper behavior, including the intimidating of students during classes (131a-134a) and one incident in which he was alleged to have "made it apparent to the student in a menacing manner that he was then armed with a pistol." (133a). Herrmann, understandably embarrassed by charges directly reflecting on his fitness as a professor of law, tries to pass off Charge V as "a mixture of miscellaneous allegations" (Pl.-App.Br., p. 13), but the significance of the allegations contained therein is shockingly self-evident.

Charges I-IV were found to be proven. (157a). Charges V (A), (B), (C), (D), (F), and three of the four offenses described in V (G) were also found proven. (157a-159a). Significantly, the faculty also determined that dismissal of Herrmann would be the appropriate sanction if the Board of Trustees, upon review, determined that "the sole charge made and proved" was any one of Charges I, IV, V(B), V(C), V(F) or V(G). (159a-160a). In other words, the

federal libel action was deemed to be only one of six separately sufficient grounds for dismissal. Herrmann's threats and intimidation of students, especially of Elbaum; his Civil Court action, out of which the federal libel action developed (see discussion at pp. 4 -6, supra); and his outrageous classroom behavior were all of equal importance to the faculty's recommendation of dismissal. Indeed, it was only when other charges were brought against Herrmann that the federal action was viewed as a sufficient justification for dismissal at all.

If, then, as Herrmann insists (see Pl.-App.Br., pp. 7-14), one must turn to the documents submitted by defendants-appellees to support his § 1985(2) claim, the terseness of the Court's rejection of that claim below becomes understandable. Herrmann, in effect, has not shown any injury "on account of" his federal libel action. The absence of such harm must defeat his claim. Cf. Frankos v. LaVallee, 535 F.2d 1346, 1349 (2d Cir. 1976) (injury must be specifically alleged in civil rights complaint).*

* Because of the multiple causes of Herrmann's dismissal, and because the federal libel action grew out of the Civil Court litigation, Herrmann's dismissal can be considered only an "indirect" effect of his federal action and thus not a cognizable injury under § 1985(2). Cf. Brawer v. Horowitz, supra, 535 F.2d at 840 (conspiracy to "'influence the verdict'" of jurors by presenting perjured testimony to them not a sufficiently direct "influence" within meaning of § 1985(2)).

C. Herrmann's Allegations Under 42 U.S.C. § 1985 Fail to Set Forth a Sufficient Showing Either of Action Under Color of Law or of Discriminatory Class-Based Animus

As is shown by the legislative history of § 1985, discussed at pages 29-31, supra, that statute was not intended to create a federal law of torts. Its protections were designed for blacks and other groups suffering from discrimination on account of their group identities. Consistent with that history and intent, the Supreme Court held, in Griffin v. Breckenridge, 403 U.S. 88 (1971), that § 1985(3)* could reach certain types of private conspiracies**, but only under certain defined conditions:

"To come within the legislation a complaint must allege that the defendants did (1) 'conspire . . .'
(2) 'for the purpose of depriving, either directly

* Section 1985(3) provides, it will be recalled, a cause of action under the following circumstances:

"If two or more persons . . . conspire . . . for the purpose of depriving, . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. . . ." 42 U.S.C. § 1985(3).

Plaintiff-appellant argues that § 1985(2) must be analyzed separately from § 1985(3). (Pl.-App.Br., p. 5). Given the legislative history of § 1985, however, the case law which has developed from the more often-litigated section, § 1985(3), provides a useful overview of the entire statute. Herrmann's arguments about the subsections of § 1985 are treated at pages 51-64, infra.

** Prior to Griffin, § 1985(3) had been construed to reach only conspiracies under color of law. See Collins v. Hardyman, 341 U.S. 651 (1951).

or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that one or more of the conspirators (3) did, or caused to be done, 'any act in furtherance of the object of [the] conspiracy,' whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.'" 403 U.S. at 102-03.

The Court also stated that in a § 1985(3) action involving a conspiracy among private individuals, it must be determined whether there is an independent constitutional source of congressional power to reach the private conspiracy alleged. In other words, it must be shown that, in the absence of state action, Congress would have the power to regulate the private conduct involved. Id. at 103-07. The Court made clear, moreover, that its decision was not to be construed as license to apply § 1985(3) "to all tortious, conspiratorial interferences with the rights of others," id. at 101, and instead required, in conformance with the legislative intent behind § 1985, that the conspiracy alleged be motivated by a "class-based, invidiously discriminatory animus" and that plaintiff be a member of the "target" class. Id. at 102.

1. Absence of Class-Based Discriminatory Animus

With respect to the requirement of a class-based invidious discrimination,* Herrmann has adopted the posture of an advocate of the rights of minorities. As has been noted, the Court's reaction to this argument was less than enthusiastic:

"Plaintiff proposes that because he is a champion of minority groups, the law school sought to remove him from his professorship. This appears to be more a 'class contrived for litigation' than a readily cognizable and traditionally protected class. See McLellan v. Mississippi Power and Light Co., 526 F.2d 870 (CA5 1976)." (9a-10a (Op.)).

Herrmann's problem here is that, his pretensions to martyrdom aside, he is not a member of any class suffering from alleged discrimination at the Law School. In his brief, he self-righteously describes an example of what he concludes is racial discrimination (21.-App. Br., pp. 16-17), but that can hardly advance the cause of a white man suing under § 1985(3), as the "class animus alleged [must] be consistent with the deprivation of rights alleged." Lopez v. Arrowhead Ranches, 523 F.2d 924, 928 (9th Cir. 1975). See also Murphy v. Mount Carmel High School, 543 F.2d 1189, 1192 (7th Cir. 1976) (complaint charging dismissal

* Griffin's first requirement, that there be proper allegations of a conspiracy, is treated at pages 64-67, infra.

on account of racial views "falls short of charging . . . conspiracy . . . aimed at . . . black persons").

The Court in Ripp v. Dobbs Houses, Inc., 366 F.Supp. 205 (N.D.Ala. 1973), gave short shrift to a plea for a similar class. There, a white employee alleged that he was discharged "'because of his association and sociable attitudes toward his fellow employees who were of the Black race.'" He further alleged that defendants maintained racially discriminatory employment policies. Id. at 207. The Court found:

"no allegation that plaintiff has been the victim of invidious discrimination. Indeed, by plaintiff's own averment, he is not a member of the class which is reached by the invidious discrimination which he alleges in his complaint. Thus, the Court holds that plaintiff has failed to state a claim under § 1985(3)." (366 F.Supp. at 213).

Since Herrmann himself is not a member of a group suffering from discrimination, he seeks to create a class of those who speak out in favor of minorities. Unfortunately for Herrmann, as the Court of Appeals for the Fifth Circuit, en banc, recently stated: "the lower courts have indicated that section 1985(3) will not be extended to every class which the artful pleader can contrive." McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 928 (5th Cir. 1977)

(en banc). * See Bricker v. Crane, 468 F.2d 1228, 1232-33 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973) (doctors who testified in malpractice cases "a novel class which is neither readily recognizable nor among those traditionally protected by the Civil Rights Act"); Jacobson v. Industrial Foundation of the Permian Basin, 456 F.2d 258, 259 (5th Cir. 1972) (Court rejected class of employees put on employers' blacklist because they have filed workmen's compensation claims).

Particularly on point is Furumoto v. Lyman, 362 F.Supp. 1267 (N.D.Cal. 1973), where former minority students at a private university sought to establish a claim under section 1985 based on their allegations that they were suspended because of their advocacy of minority rights. There, the Court stated:

"The Supreme Court in Griffin v. Breckenridge stressed that the exception to state action in § 1985(3) was a precisely limited one and did not constitute a 'general federal tort law.' 403 U.S. at 101-102, 91 S.Ct. 1790. In extending Griffin, thus, precision must be retained. The only relevant classes in which plaintiffs would appear to fall are 'non-white opponents of racism' and 'disrupters of university operations for social or political reasons.' Neither of these is sufficiently limited to pass the Griffin test, and

* The Court below relied on the panel opinion in McLellan, 526 F.2d 870, 872 (5th Cir. 1976), for the proposition that a class may not be "contrived for litigation purposes", but must have "real-world roots".

plaintiffs have failed to show or allege other facts demonstrating the necessary class-based, discriminatory intent. Cf. *Action v. Gannon*, 450 F.2d 1227, 1232 (8 Cir. 1971)." Id. at 1286.

If "non-white opponents of racism" do not constitute an acceptable class, white advocates of minority rights can hardly be a valid class for § 1985 purposes.

Similarly, in *Heyn v. Board of Supervisors*, 417 F.Supp. 603 (E.D.La. 1976), aff'd, 550 F.2d 1282 (5th Cir. 1977), the Court held that the plaintiff professor's complaint, charging a wrongful denial of promotion by a state university, did not state a claim under § 1985(3). As in the present case, the plaintiff had alleged that the university had retaliated against him on account of his expression of certain views. The Court found this an insufficient class discrimination allegation.

"Plaintiff asserts that he is a member of a class of university professors who were discriminated against in the exercise of their First Amendment privileges, and, therefore, that Section 1985(3) should apply. The Court does not agree. The mere allegation that Professor Heyn was discriminated against does not of itself make Section 1985(3) applicable. . . .

. . . .

"The Civil Rights Act of 1871 was not designed to furnish relief for every injury. As stated, Plaintiff has failed to demonstrate the class-based animus necessary to maintain this action." (footnote omitted) 417 F.Supp. at 606-07.

See also Ohio Inns, Inc. v. Nye, 542 F.2d 673, 679 (6th Cir. 1976), cert. denied, 430 U.S. 946 (1977).

Moreover, even if such a trumped-up class were theoretically valid, Herrmann's allegations would not be sufficient to sustain it here. Nowhere does he allege that other white advocates of minority rights were discriminated against, and where it is not shown that there exists a "general pattern of discrimination", a § 1985(3) claim is not made out. See Keddie v. Pennsylvania State University, 412 F.Supp. 1264, 1276 (M.D.Pa. 1976). See also Barrett v. United Hospital, 376 F.Supp. 791, 806 (S.D.N.Y.), aff'd, 506 F.2d 1395 (2d Cir. 1974).

Indeed, Herrmann proved the absence of such a class in his own affidavit in opposition to the motion to dismiss below. (275a-584a). Attached as an exhibit thereto is a transcript of the following testimony of Professor Oscar Chase at Herrmann's disciplinary hearing in August of 1975:

"I also would like to add that, as many of you know, I have tried to be a champion to the cause of further integrating the faculty and student body, and so forth, at Brooklyn Law School. I should add that I've not been as successful in this endeavor as I would have liked to be, and I think the law school has a long way to go in this area.

"However, I must also add, because of some of the allegations that have been made in these lawsuits, that at no time have I ever felt, either by the administration of [sic] any of any of my colleagues, persecuted or even disliked in any way because of my advocacy, with which many of you don't apparently agree. But at least you seem to respect it." (487a-488a).

The only evidence in the record in point, therefore, defeats Herrmann's proposed class. See Potenza v. Schoessling, 541 F.2d 670, 672 (7th Cir. 1976) (where persons with criminal records still employed at defendants' company, § 1985(3) claim that persons were discharged therefrom because of their criminal records must be dismissed).

2. No Independent Source of Congressional Power to Reach Violation Alleged

Herrmann seeks to avoid the effect of his failure to allege sufficient membership in a protected class by reference to a few decisions (see Pl.-App.Br., p. 15) which have held that Section 1985(3) applies to persons who have been discriminated against purely on account of their exercise of First Amendment rights. Adopting the view of the better reasoned cases, however, the Court below took a dim view of Herrmann's attempt to circumvent the problem of his lack of class membership, holding that a claim of private interference with freedom of expression did not state a cause of action "absent state action" 10(a) or "a class

based discrimination" (ibid.), prerequisites which it had already determined not to exist.

Hermann's claim cannot overcome a tremendous constitutional hurdle - the fact that the First Amendment is not self-enforcing and that it is only applicable to governmental acts. In Griffin, the plaintiffs were blacks who were beaten on the highway and were able to predicate their § 1985(3) claim directly on the Thirteenth Amendment and the right to travel - rights which are enforceable directly against private persons as well as against the government. Here, of course, Hermann must look elsewhere for a constitutional basis for his complaint.

The most recent and most exhaustive treatment of this problem is found in Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976). There, a tenured teacher at a private school brought a § 1985(3) action against the school and various of its administrators for his allegedly wrongful dismissal. As in the present litigation, plaintiff sought to cloak himself with the protections of § 1985 by claiming that he openly advocated policies of equal rights, including racial equality, which defendants found objectionable. He alleged that the real reason for his dismissal was, inter alia, his criticism of school policies regarding

the hiring of minority faculty and argued that, although he was white, the defendants' wholly private conspiracy, resulting in his dismissal, deprived him of his First Amendment right to speak out on behalf of blacks and women.

As in the present case, the plaintiff in Murphy could look only to the First and Fourteenth Amendments as sources of congressional power to deal with the conspiracy alleged, for his essential claim was not racial discrimination but a conspiracy to interfere with his freedom of expression; and, of course, the guarantees of the First Amendment run only against the federal government and, through the due process clause of the Fourteenth Amendment, against the states. 543 F.2d at 1192-93. Since the Fourteenth Amendment only protects persons from state action, the Court held that § 1985(3) could not provide a remedy for a purely private conspiracy to invade First Amendment rights. Id. at 1193-94.

"The suggested extension of the scope of actions brought under § 1985(3) to include private conspiracies to curtail expression because of a class-based invidiously discriminatory animus or which produce a private impairment of expression as a result of an otherwise actionable conspiracy, is, of course, not required by Griffin. The Supreme Court noted that the facts alleged in Griffin brought the cause of action 'close to the constitutionally authorized core of the statute.' . . . The extensions urged on us here would embrace conduct far from that core, and, we think, would be unsound in the absence of clearer direction by the Supreme Court. (footnote omitted) Id. at 1195.

The soundness of the Court's reasoning, and its applicability to the case at bar, are self-evident. Any claim of a deprivation by private persons of rights secured through the Fourteenth Amendment, such as First and Fifth Amendments rights (or, indeed, of rights secured by the Fourteenth Amendment itself, such as equal protection of the laws), requires the presence of state action. As has already been demonstrated, in Point 1 supra, no state action can be shown here. Herrmann's § 1985 claim therefore was properly dismissed. Accord, Doski v. M. Goldseker Co., 539 F.2d 1326, 1333-34 (4th Cir. 1976); Cohen v. Illinois Institute of Technology, 524 F.2d 818, 828-30 (7th Cir. 1975) (Stevens, J.), cert. denied, 425 U.S. 943 (1976); Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 506-07 (4th Cir. 1974); Dombrowski v. Dowling, 459 F.2d 190, 195-96 (7th Cir. 1972); Bradley v. Clegg, 414 F.Supp. 31, 33 (E.D.Wis. 1976). See also Ripp v. Dobbs Houses, Inc., supra, 366 F.Supp. at 215; Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction

Era Amendments, 74 COLUM. L. REV. 449, 517 (1974).*

3. Section 1985(2) Subject to Same Requirements as Section 1985(3)

While insisting that he has met all of the Griffin requirements for his § 1985 claims, Herrmann further argues that his § 1985(2) claims are not subject to those requirements. Subsection 2 of § 1985, it will be recalled, contains provisions dealing with both federal and state courts. (See page 28, supra.)

* Hermann cites a number of cases permitting § 1985(3) actions alleging interference with freedom of expression. In three of them, however, Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973); Puentes v. Sullivan, 425 F.Supp. 249 (W.D. Tex. 1977), and Crawford v. City of Houston, 386 F.Supp. 187 (S.D. Tex. 1974), the defendants were local governmental entities and officials, providing the element of state action. Since state action provides the necessary constitutional predicate for the enforcing of the First Amendment, see Murphy v. Mt. Carmel High School, supra, 543 F.2d at 1192-94; Puentes v. Sullivan, supra, 425 F.Supp. at 253, the courts in those cases did not need to reach the question of an independent source of congressional power to reach the conspiracies alleged. Hermann is not so fortunate. He cannot rely on any suitable basis for his § 1985(3) action against private persons. Those cases are thus of no help to him. Indeed, the analysis of this issue in Puentes is somewhat superfluous, since the court concludes by holding that action under color of law is a perfectly adequate substitute for the Griffin requirements. 425 F.Supp. at 253.

Two other cases relied on by Hermann, which predate Murphy, Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971), and Pendrell v. Chatham College, 370 F.Supp. 494 (W.D.Pa. 1974), upheld without elaboration, in the absence of state action, § 1985(3) claims alleging discrimination against plaintiffs because of their views.

(footnote continued on next page)

It is Herrmann's probable contention, although poorly articulated (see Pl.-App. Br., p. 5), that only that portion of § 1985(2) following the semi-colon (on the thirteenth line of paragraph "(2)" on page 28, supra), which deals with conspiracies to obstruct justice in the state courts with the intent to deny anyone the equal protection of the laws, is limited by the Griffin requirements.* The first clause, dealing with injuries on account of attending or testifying

(footnote continued from previous page)

Richardson, however, did not even address the crucial Griffin issue of an independent source of congressional power. Pendrell also is not a compelling authority, since the plaintiff there was a member of one of the classes allegedly suffering discrimination, namely women, and therefore did not have to rely on a Herrmann-type "advocacy" class.

Another case cited by Herrmann on this point, Action v. Gannon, 450 F.2d 1227, 1235 (8th Cir. 1971), relies on the concurring and dissenting opinions in United States v. Guest, 383 U.S. 745 (1966), which construed one of the criminal civil rights statutes (18 U.S.C. § 241). Action held that Congress has the power under the Fourteenth Amendment to punish private conspiracies, a conclusion contrary to the opinion of the Court in Guest and the weight of the case law construing § 1985(3). See Murphy, supra, 543 F.2d at 1194.

* Although he appears to have abandoned such a claim, Herrmann might also wish to argue that none of the provisions of § 1985(2), including the second clause, is subject to the Griffin requirements. The case law, however, is overwhelmingly to the contrary. See, e.g., Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976); Person v. New York Post Corp., 427 F.Supp. 1297 (E.D.N.Y. 1977); Brainerd v. Potratz, 421 F.Supp. 836, 839 n.2 (N.D. Ill. 1976); Kerckhoff v. Kerckhoff, 369 F.Supp. 1165, 1166 (E.D. Mo. 1974); McIntosh v. Garofalo, 367 F.Supp. 501 (W.D.Pa. 1973); Phillips v. Singletary, 350 F.Supp. 297, 302 (D.S.C. 1972) (referring to §§ 1985(2) and 1985(3) as "kindred sections of a common statutory scheme"). See also Stambler v. Dillon, 302 F.Supp. 1250 (S.D.N.Y. 1969).

as a party or witness in federal court, under which he claims a violation, contains no equal protection language. Herrmann argues that the absence of such language reflects an intent to leave that clause unrestricted by any requirement of class-based discrimination.

Such a reading does violence to the history behind the statute and is contrary to the better reasoned cases. All of the elements of § 1985(2) and (3) were part of a unified scheme which is both given meaning and limited by its history. Moreover, even if it could be argued that the Griffin requirements do not apply in full to the first clause of § 1985(2), Herrmann's federal libel action is not the type of federal case which § 1985(2) was meant to shield from private deterrence. Thus, although the Court below properly rejected Herrmann's § 1985(2) claim on other grounds, that claim may also be dismissed as falling entirely outside this statutory scheme.

a) Legislative History

The amended version of Section 2 of the Klan Act which was introduced in the House made it a high crime, inter alia:

". . . if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the Government of the United States . . . or by force, intimidation, or threat to

deter any witness in any court of the United States from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such witness in his person or property on account of his having so testified, or by force, intimidation, or threat to influence the verdict of any juror in any court of the United States, or to injure such person in his person or property on account of any verdict lawfully assented to by him or shall conspire together for the purpose either directly or indirectly of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, . . . or to injure any person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws. . . ." CONG. GLOBE, 42nd Cong., 1st Sess. 477 (1871) (emphasis added).

The amendment also provided for a federal private cause of action for damages suffered by anyone as a result of a violation of Section 2.

In introducing the amended Section 2, Representative Shellabarger of Ohio commented:

"The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights shall be within the scope of the remedies of this section." Id. at 478.

The purpose of the amendment, then, was "to confine the authority of this law" to injuries resulting from

equal protection violations.* No distinction among the various provisions of Section 2 of the Klan bill was intended.

Moreover, even assuming that not all of the restrictions on what became § 1985(3) were intended to limit the first clause of § 1985(2), it is quite clear from the legislative history that Congress did not intend to extend the protections of § 1985(2) to the situation in this case. A telling indication of Congress' intent as to the purpose of the first clause of § 1985(2) is found in a comment by Senator Edmunds of Vermont regarding the Senate version of Section 2 of the Klan Act, which added parties in federal courts to the coverage of what is now the first clause of § 1985(2). Senator Edmunds, the author of the Senate amendment, explained:

* Section 2 had originally been a much broader statute, making it a crime

" . . . [for] two or more persons . . . within the limits of any State, [to] band or conspire together to do any act in violation of the rights, privileges, or immunities of another person, which, . . . would under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson or larceny; . . ." *Id.* at Appendix, 68-69 (remarks of Rep. Shellabarger; emphasis added).

The open-ended nature of this provision had created concern that it would create a federal common law of crimes. *Id.* at Appendix, 112 (remarks of Rep. Moore); *id.* at Appendix, 138-39 (remarks of Rep. McCormick). Representative Shellabarger's subsequent draft was obviously framed to meet these objections.

"The House had made no provision for punishing a conspiracy to hinder any person who was obliged to resort to the courts for redress, but they had undertaken to make provision for securing the witnesses and the jurors. It appeared to us that it would be a somewhat singular course of legislation to afford no protection to parties who had been hindered and oppressed and who were undertaking to resort to the judiciary for their protection, while we undertook to protect the agencies through which that protection was to be obtained, leaving the conspirators to conspire against the life of the party; and if they should succeed in that conspiracy there would be no occasion for them to conspire against his liberties, for he would be dead and gone." CONG. GLOBE, supra, at 567 (emphasis added).

The tone of Senator Edmunds' remarks suggests that the purpose of this section of the bill was not to protect any and all uses of the federal courts, but to protect persons "who had been hindered and oppressed" and who accordingly had sought "redress" for such oppression. In the context of these discussions, the phrase "hindered and oppressed" was hardly a term of art used to describe any plaintiff bringing an ordinary tort action in a federal court. Rather, that phrase reflects a concern for those racial and political groups which, because of widespread class-based discrimination, especially required redress in the federal courts.

This conclusion is supported by another comment by Senator Edmunds, this time on what became the second clause of § 1985(2).

"We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, (which is a pretty painful instance that I have in my mind in the State of Florida within a few days where a man lost his life for that reason,) then this section could reach it. Id. at 567 (emphasis added).

Only if action were taken against a man because of his race, his religion, his nationality or political affiliation, did Senator Edmunds believe the statute to give rise to a federal cause of action. Accordingly, it would seem that when Edmunds proposed, and the Congress approved, an amendment to give a cause of action to "parties [in federal courts] who had been hindered and oppressed", the primary concern here, too, was with those who had been seeking "redress" in the federal courts for racial, religious or other class-based discrimination, and not with those settling personal or commercial disputes.

Another indication of the same intent is the frequency with which Congress expressed concern over the Klan's success in frustrating attempts by the black freedmen to vindicate civil rights in state courts. For example:

"[I]t is said these crimes should be punished by the States; that they are already offenses under the laws of the state. . . . The great fact remains that large classes of people, numbering nearly one half in some of the States, are without legal remedy in the courts of the state.

* * *

"What protection can a court afford against such men [i.e., members of the Klan] when their fellows are required to appear as witnesses and commit perjury in their defense, or to procure themselves to be thrust upon juries and there to acquit, no matter what the evidence might be; when the intimidation of officers is a part of their policy, threats to be served upon judges, upon jurors, upon sheriffs, and upon every officer connected with the administration of justice?" Id. at Appendix p. 252 (Remarks of Rep. Morton).

Accord, id. at 321-22 (Remarks of Rep. Stoughton); id. at 468 (Senate Resolution).

It would appear, then, that § 1985(2) was enacted to safeguard the integrity of the federal courts against conspiratorial interferences in those particular cases where state courts were proving themselves inadequate, i.e., when civil rights were being violated and where conspiratorial action directed against certain classes made it impossible for them to enjoy the equal protection of the laws. In order to conform with this intent, it is submitted that, in the absence of state action or class-based discrimination, the coverage of the first clause of § 1985(2) must be limited to instances where persons are alleging injury "on account of" having participated previously in a federal

civil rights action or in a federal proceeding otherwise bearing some relationship to the core purpose of § 1985.

Here, Herrmann's prior federal action was a libel action against the Dean of Brooklyn Law School, his employer, along with three other faculty members, growing out of his ongoing dispute with the Law School over money.* This type of action is not that which Congress had in mind when it sought, in passing what became § 1985(2), to make the federal courts havens for persons suffering class-based discrimination.** The first clause of § 1985(2) could not have been intended to allow any disgruntled employee to insulate himself from the possibility of discharge merely by filing a federal lawsuit against his employer.

* Herrmann's 81-paragraph libel complaint suggests at one point that the libels were motivated partially by Herrmann's "championship of equal rights" (67a), but the thrust of his claims was clearly in the nature of economic and emotional injuries resulting from ordinary tortious conduct. (See 70a, 72a, 73a, 75a.)

** Moreover, Herrmann's common law tort action was only in federal court because of diversity of citizenship. (56a). But for such diversity, Herrmann would have to have sued in state court, and thus would have had to have based his present action on the second clause of § 1985(2). Herrmann can hardly claim that he has suffered discrimination because he is from Connecticut, and it seems somewhat anomalous to allow him to bring a § 1985(2) action without having to show class-based discrimination simply because he does not reside in New York.

b) Case Law

Of the very few cases which have focused on the first clause of § 1985(2), Jones v. United States, 401 F.Supp. 168 (E.D.Ark. 1975), aff'd, 536 F.2d 269 (8th Cir. 1976), appears to reflect the most careful analysis of the legislative intent behind that provision.

"It was noted [in Griffin] that § 1985(3) was enacted in 1871 by the Forty-Third Congress in an attempt to enforce the Fourteenth Amendment against the violent and continuing indignities being perpetrated by members of the Ku Klux Klan. . . .

"There was considerable question in the minds of some of the representatives of the Forty-Second Congress with regard to whether or not Congress could constitutionally enact a bill which would allow the federal government to prosecute an individual for a common law crime. . . . Because of this constitutional concern the bill was amended. . . . The amendment . . . allowed for civil remedies in the event of any violation, and is basically the forerunner of what is now 42 U.S.C. § 1985. From a reading of the legislative history it is apparent that the legislative intent of the Cook-Shellabarger amendment, upon which the Supreme Court in Griffin relied, was a reference to the entirety of the act. . . .

"Representative Shellabarger, [in stating that the purpose of the amendment was "to confine . . . this law to the prevention of deprivations" of equal rights][*] . . . was referring to the entire portion of what is now 42 U.S.C. § 1985. He was not referring to any

* See page 54, supra.

particular portion of the statute or any particular clause of the amendment. If the Griffin court relied upon this language as an indication of Congressional intent to require racial or class-based animus as an element of a cause of action under 42 U.S.C. § 1985(3), it must follow that such an element is necessary under any portion of 42 U.S.C. § 1985.

"Since the language and style of § 1985(3) is similar to § 1985(2), it is not a great step to conclude that if racial or class-based animus is necessary under all of § 1985(3) it must be necessary under all of § 1985(2)." 401 F.Supp. at 173-74.*

This analysis was upheld on appeal. 536 F.2d at 271.

Herrmann relies heavily upon Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976), which holds that class-based discriminatory animus is not applicable to the first clause of Section 1985(2), while holding that such animus is required under the second part of the same sentence. This conclusion is based largely on the court's reading of the legislative history of the act, especially Senator Edmunds' comment, quoted at page 57, supra, to the effect that "we do not undertake . . . to interfere with . . . a neighborhood feud. . . ." 535 F.2d at 839.

* The Court also noted that in Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), class-based discrimination had been required under the third clause of § 1985(3), concerning deprivations of voting rights. As the voting rights clause under § 1985(3) does not contain the equal-protection language found in the other parts of § 1985(3), the obvious implication arises that racial or class-based discrimination is necessary throughout § 1985 whether or not there is equal protection language. 401 F.Supp. at 174.

Upon careful reading, this passage provides little support for the Brawer court's interpretation. If anything, the clear import of Senator Edmunds' remarks is to highlight the requirement of discriminatory class-based animus, and to undercut the contention that the nexus used by Congress, and the intent of the statute, was to cover all interferences with federal lawsuits regardless of type.*

* Another case cited by Hermann for the proposition that the Griffin requirements need not be met in a § 1985(2) action is Crawford v. City of Houston, 386 F.Supp. 187 (S.D.Tex. 1974). That action, however, was brought against local governmental officials for wrongs done in their official capacities. The presence of state action in that case would seem to obviate the need to meet the Griffin requirements. As the court stated in Puentes v. Sullivan, 425 F.Supp. 249 (W.D.Tex. 1977) (cited in plaintiff-appellant's brief at pages 14-15):

"The Griffin requirement of class-based discrimination is merely a limitation on the Court's ruling that private conspiracies are subject to § 1985(3). The Griffin Court expressly recognized that § 1985(3) reaches a conspiracy, under color of state law, to deprive individuals of constitutional rights." 425 F.Supp. at 253.

Since action under color of law was involved in Crawford, the requirements of § 1985(2), which all parties agree are certainly no stricter than those of § 1985(3), would appear to be satisfied, whether or not all the Griffin criteria could be met. That case, therefore, is hardly decisive in this action against a private employer.

(Footnote continued on next page)

To construe § 1985(2) as creating a general right of action linked only to the nature of the court brings the statute very close to a "general federal tort law" available to anyone who has ever been a federal litigant, the type of result against which the Supreme Court warned in Griffin, supra, 403 U.S. at 102. It is submitted that the view of the Jones Court is correct, and that absent state action or invidious class-based discriminatory animus sufficient to satisfy the Griffin requirements, there is no cause of action under Section 1985(2), unless, perhaps, the federal action which serves as a predicate for the § 1985(2) action is itself a civil rights action. As there is no sufficient allegation of state action (see pp. 18-27, supra), and no sufficient allegation of invidious, class-based discrimination, Herrmann's Section 1985(2) claim, based on alleged injury on account of having brought a libel complaint, was properly dismissed by the Court below.

(Footnote continues from previous page)

Another case cited by Herrmann, Kelly v. Foreman, 384 F.Supp. 1352 (S.D.Tex. 1974), while an action against private individuals, comes closer to the intent of § 1985(2) than does this action. The prior interference being alleged consisted of threats to prevent plaintiff from giving testimony as to certain criminal violations. While no class-based animus was present, the interference alleged was the type of interference with public duties which led to the enactment of the Klan Act.

D. Herrmann Has Also Failed to
Allege an Actionable Conspi-
racy Under 42 U.S.C. § 1985

The defendants-appellees named in this action are Brooklyn Law School, its trustees and some of its faculty.* As the wording of both Section 1985(2) and 1985(3) makes clear, a "conspiracy" of "two or more persons" is an absolute prerequisite for any claim thereunder. It is clear that an action against a corporate entity and its agents under Section 1985 does not state a cause of action, since it alleges merely a "single act of discrimination by a single business entity," reflecting "the collective judgment of two or more executives of the same firm." Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972) (per Judge, now Justice, Stevens). Accord, Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 508 (4th Cir. 1974) (Boreman, J., concurring); Jones v. Tennessee Eastman Co., 397 F.Supp. 815, 816 (E.D.Tenn. 1974), aff'd, 519 F.2d 1402 (6th Cir. 1975); Fallis v. Dunbar, 386 F.Supp. 1117, 1121-22 (N.D.Ohio 1974), aff'd, 532 F.2d 1061 (6th Cir. 1976); Rubenstein v. University of Wisconsin Board of Regents, 422 F.Supp. 61 (E.D.Wis.

* Steven S. Elbaum and S. Hal Mercer IV were students at the Law School. However, no allegation of the Complaint ties Elbaum or Mercer to any conspiratorial activity, and there is no hint at all in the Complaint as to the nature of their participation. It is insufficient, of course, to simply list persons as defendants, and then, without linking them to the plaintiff's injuries, base a cause of action on their presence.

1976) (holding that individual members of Board of Regents constitute a single entity and that such entity cannot conspire with its agents).

Particularly on point, with regard to a private university setting, is Cole v. University of Hartford, 391 F.Supp. 888 (D.Conn. 1975), where plaintiff, as here, alleged a § 1985(3) conspiracy involving "numerous discriminatory treatments" on the part of his employer, a private university and two officials thereof. 391 F.Supp. at 890 n.1. In spite of allegations of specific acts taken by the officials in furtherance of the conspiracy (resulting, also as here, in plaintiff's dismissal), the Court held that plaintiff had not properly alleged a conspiracy between "two or more persons" for § 1985(3) purposes.*

(Footnote continued from previous page)

Since these students are not implicated in any specific allegation, no action may be maintained against them, Buck v. Board of Elections, 536 F.2d 522, 525 (2d Cir. 1976), Rende v. Rizzo, 418 F.Supp. 96, 98 (E.D.Pa. 1976), thus eliminating the only persons with whom the Law School might conspire.

- * Furthermore, the fact that the officials were joined as defendants in their individual capacities made no difference. The Court explained that the university could only conspire through one or more persons acting in their official capacities and that no allegation had been made that the officials "acted other than in the normal course of their corporate duties." 391 F.Supp. at 893. The complaint therefore had to be construed as alleging actions taken in the individual defendants' official capacities and thus on behalf of only one entity, the university.

Similarly, in this case, plaintiff Herrmann has alleged no act by any defendant of a personal nature outside the normal course of duty at Brooklyn Law School. As in Cole, "[t]he only realistic target . . . is the [school]." 391 F.Supp. at 893. See also Keddie v. Pennsylvania State University, 412 F.Supp. 1264, 1276 (M.D.Pa. 1976) (alleged conspiracy among university and various officials and faculty members thereof responsible for denial of tenure to plaintiff construed as "essentially the act of a single entity" under § 1985). Accord, Cohen v. Illinois Institute of Technology, 384 F.Supp. 202, 205 (N.D.Ill. 1974), aff'd, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); Milburn v. Blackfrica Promotions, Inc., 392 F.Supp. 434, 436 (S.D.N.Y. 1974).

In the absence of any sufficient allegation of conspiracy, therefore, the claims under 42 U.S.C. § 1985 must be dismissed.*

* It should be noted that the complaint herein yields almost no information about the events upon which plaintiff-appellant bases his claim for relief. Almost the only material non-conclusory allegation of fact in the entire complaint (see especially 16a-20a) is found in paragraph 20, which merely alleges that "[a]s a result . . . the plaintiff has lost his employment . . ." (17a-18a). Such a complaint does not reflect an awareness that allegations of a conspiracy under either § 1983 or § 1985 must be specific, Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2d Cir. 1964);

CONCLUSION

It has been observed that "[t]he Civil Rights Statute was not designed to sponsor career litigants or permit duplicative efforts to prevail." Smith v. Sinclair, 424 F.Supp. 1108, 1111 (W.D. Okla. 1976). Here, plaintiff-appellant Herrmann has sought to embroil Brooklyn Law School

(Footnote continued from previous page)

Valley v. Maule, 297 F.Supp. 958 (D.Conn. 1968), and that conclusory claims of conspiracy unsupported by factual allegations tending to show an agreement are insufficient to establish § 1985(3) claim, Everett v. City of Chester, 391 F.Supp. 26, 29 (E.D.Pa. 1975); Drusky v. Judges of Supreme Court, 324 F.Supp. 332, 333 (W.D.Pa. 1971).

As this Court has very recently written:

"[C]omplaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed. . . . Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Ostrer v. Aronwald, Docket No. 77-6118 (2d Cir. Dec. 27, 1977) (per curiam) (Slip Op. at 813).

See also, Place v. Shepherd, 446 F.2d 1239 (6th Cir. 1971) (conclusory allegations of conspiracy to deprive plaintiff of First Amendment rights, including fairly detailed allegation that plaintiff was forced to resign, not sufficient).

Moreover, the absence of allegations connecting any of the defendants to the plaintiff's firing must defeat plaintiff's § 1985 conspiracy claim "since there is no indication that . . . any of the [defendants] engaged in the allegedly discriminatory activity." Buck v. Board of Elections, 536 F.2d 522, 525 (2d Cir. 1976). See also, LaRouche v. City of New York, 369 F.Supp. 565, 567 (S.D.N.Y. 1974). It is clear therefore that Herrmann's complaint would have been dismissed solely on the grounds that it is vague and conclusory.

and thirty-eight individuals in several ill-conceived and baseless litigations, of which this is one -- lawsuits growing out of his own malefactions and shortcomings.* As the above discussion clearly demonstrates, he does not sufficiently state any claim in this action, and, under all reasonable constructions of the allegations, even including material in his affidavit and briefs and in defendants-appellees' material, he cannot state any cognizable federal claim under the First, Fifth and Fourteenth Amendments or under Sections 1983 and 1985 of the Civil Rights Acts.

* There is no reason to expect that anyone else who disrupted his academic community in the same manner as has plaintiff would not rightly suffer the same fate. As one court held:

"[a] college ha[s] no right to control [a teacher's] speech or to curtail his freedom of association, but they (sic) [do] have a right to terminate his employment as a classroom instructor at the point where the exercise of his constitutional privileges clearly over-balance[s] his usefulness as an instructor." Ferguson v. Thomas, 430 F.2d 852, 859 (5th Cir. 1970).

Accord, Stewart v. Bailey, 556 F.2d 281, 284 (5th Cir. 1977).

Accordingly, the order and judgment below should
be in all respects affirmed.

Dated: New York, New York
January 20, 1978

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - X

WILLIAM S. HERRMANN, :

Plaintiff, :

-against- :

LEONARD P. MOORE, et al., :

Defendants. :

- - - - - X

AFFIDAVIT OF SERVICE

Docket No. 77-6184

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

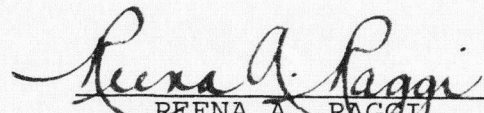
REENA A. RAGGI, being duly sworn, deposes and says:

1. I am over the age of 18 years and am not a party to this action.

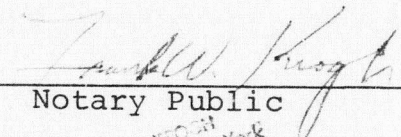
2. On the 20th day of January, 1978, I served two xerox copies of the annexed Brief for Appellees by causing them to be mailed, first-class, post pre-paid, upon the following:

MARTIN & WIGGINS
342 Madison Avenue
Suite 912
New York, New York 10017

3. On the 23rd day of January, 1978, I served the annexed Brief by causing to be mailed first-class, postage pre-paid, three copies thereof upon the above.


REENA A. RAGGI

Sworn to before me this
23rd day of January, 1978.


Notary Public

STATE OF NEW YORK
Notary Public
Commission Expires January 23, 1981

